

Principles and Techniques for Dealing with Self Represented Litigants in the Courtroom

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Outline

- What we know about self-represented litigants
- The distinction between legal advice and legal information
- Self represented litigants in the courtroom
 - ethical and practical issues facing the trial judge

What We Know

References

- 2002 meta analysis of 35 program evaluations
- 2004 TCRIC assessment of programs in nine jurisdictions
- 2004 California AOC evaluation of 5 pilot programs

Demographics of Self Represented Litigants

- Income and education level vary by location
- Majority are poor
- Majority have a high school education
- Majority are women
- Majority are petitioners, not respondents
- High percentage have Internet access

TCRIC Jurisdictions

	Balti more City	Har ford	Mont gom ery	Prince Geor ges	Wor ces ter	Alaska	Dade	Henne pin	Mari copa
Male	32%	41%	44%	47%	48%	33%	47%	65%	30%
Female	68%	59%	56%	53%	52%	67%	53%	35%	70%
Median age	35-44	35-44	35-44	35-44	25-34	25-34	35-44	35-44	35-44
Median Monthly income	\$500 - \$1,000	\$2,000- \$2,500	\$2,000- \$2,500	\$2,000- \$2,500	\$8,000	\$1,500- \$2,000	\$1,000- \$1,500	\$1,000- \$1,500	\$2,000- \$2,500
Median educa tion	high school	high school	some college	some college	high school	some college	some college	some college	high school
White	10%	73%	46%	13%	70%	59%	64%	31%	66%
Non-white	90%	27%	54%	87%	30%	41%	36%	69%	34%
Hispan ic	0%	7%	46%	9%	4%	6%	61%	11%	43%

Why don't they have a lawyer?

- Believe they can't afford one
- Believe the case is simple enough to handle on their own
- Don't want to pay a lawyer
- Lawyer will slow everything down
- Don't trust lawyers

Impact of self-represented litigants on the court

Increase in frequency

- Maricopa County domestic relations cases
 - 24% in 1980
 - 47% in 1985
 - 88% in 1991
- Washington state – annual increase from 1995 - 2001
 - Dissolution w/out children - +1.3%
 - Dissolution with children - +0.8%
 - Paternity, Domestic violence, Torts and commercial, Property rights - flat

Disintermediation

- Pumping gas
- Fixing homes
- Selling own home
- Trading stocks without broker's advice
- Self medicating
- Home schooling
- Representing themselves in court

Differential rates of self-representation

■ California 2001

Small claims	91.1
Infractions	83.1
Unlawful detainer	81.1
Family	35.3
Civil < \$25,000	11.5
Motor vehicle torts	6.1
Felony property crimes	4.5
Juvenile dependency	0.3

Likelihood of event

Both unrepresented v. at least one not
(Washington 2001)

Dissolutions with children

Non-jury trial	2.1%	41.9%
Motion hearing	37.3%	74.7%
Continuance	1.5%	35.6%

Dissolutions without children

Non-jury trial	1.0%	40.1%
Motion hearing	23.4%	57.7%
Continuance	0.1%	24.3%

Minutes required for hearing

Both unrepresented v. at least one not
(California 2001)

Probate	3.4	17.2	+400%
Felony/person	14.0	37.7	+169%
M V torts	16.1	22.3	+45%
Family	15.8	12.2	-30%
Small claims	15.5	10.4	-49%
Drug	6.8	4.3	-58%
Unlwfl detainer	13.0	5.7	-128%
Felony/property	8.8	3.7	-138%

Time from filing to disposition

- Washington state 2001

Dissolution with children

345 days v. 136 days

Dissolution without children

283 days v. 111 days

- National Center for State Courts

similar findings for four of five courts

User Satisfaction with Self Help Programs

Citizens Use Different Criteria for Evaluating the Outcome of a Court Proceeding

National Center for State Courts, *Trust and Confidence in the California Courts 2005*

- Litigants focus on the fairness of the court process in assessing a court hearing (procedural justice)
- Attorneys are more concerned with the fairness of the outcomes of the cases than with the fairness of the process by which the outcomes are attained.

Components of “Procedural Justice” – Professor Tom Tyler

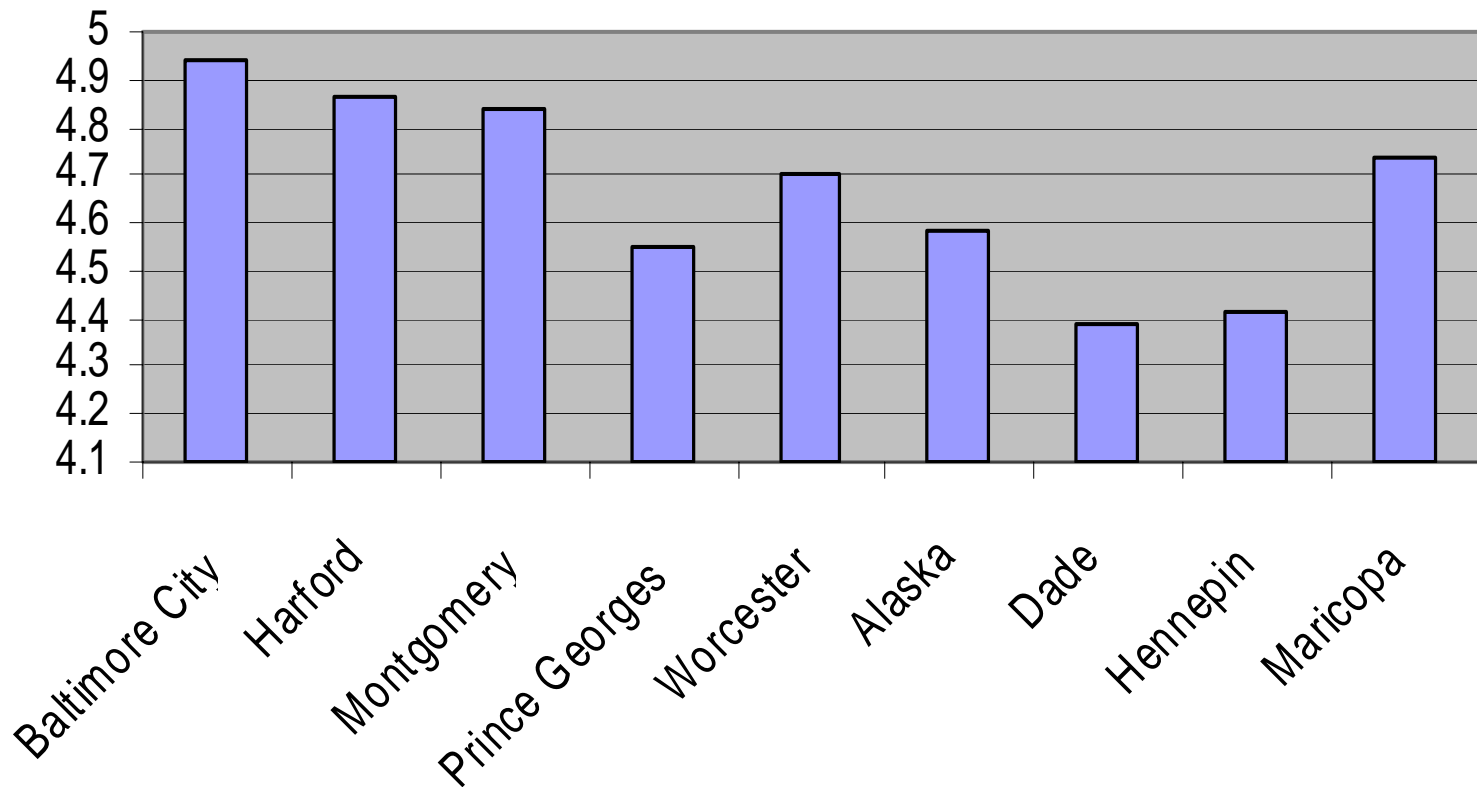
- Interpersonal respect – persons in the court are treated with dignity and respect and their rights are protected.
- Neutrality – judges are honest and impartial decision makers who base decisions on facts.
- Participation – parties have the opportunity to express their views to decision makers, directly or indirectly.
- Trustworthiness – judges are benevolent; they are motivated to treat you fairly, are sincerely concerned with the needs of the parties, and consider their sides of the story.

Other Findings

- Citizens rate their ability to obtain timely dispositions and the convenience of the hours of operation of the courts as among their highest unmet expectations.
- The high cost of attorneys is seen as the highest barrier to accessing justice.

Litigant Ratings of Court Services

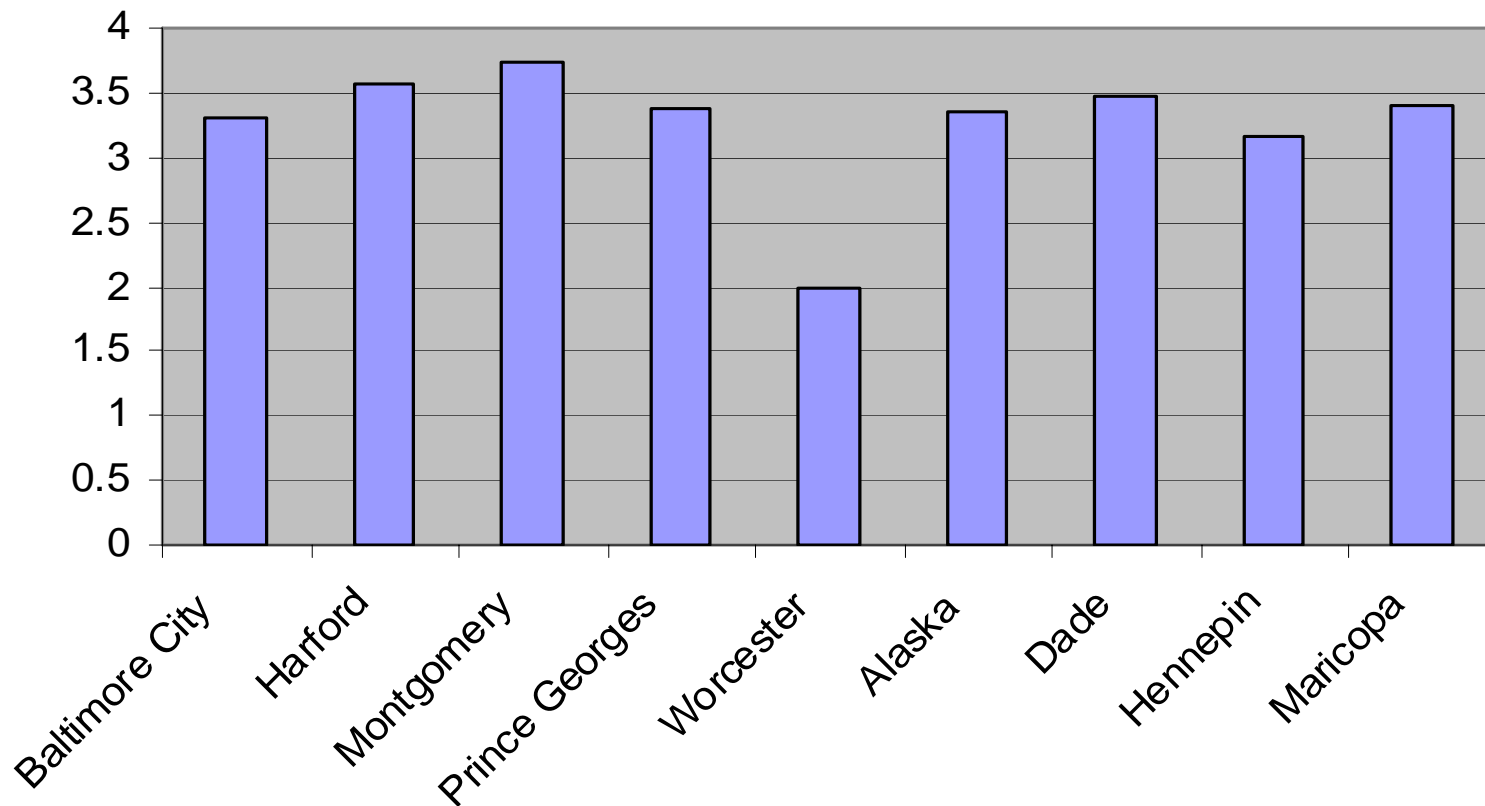
High at the Time of Use



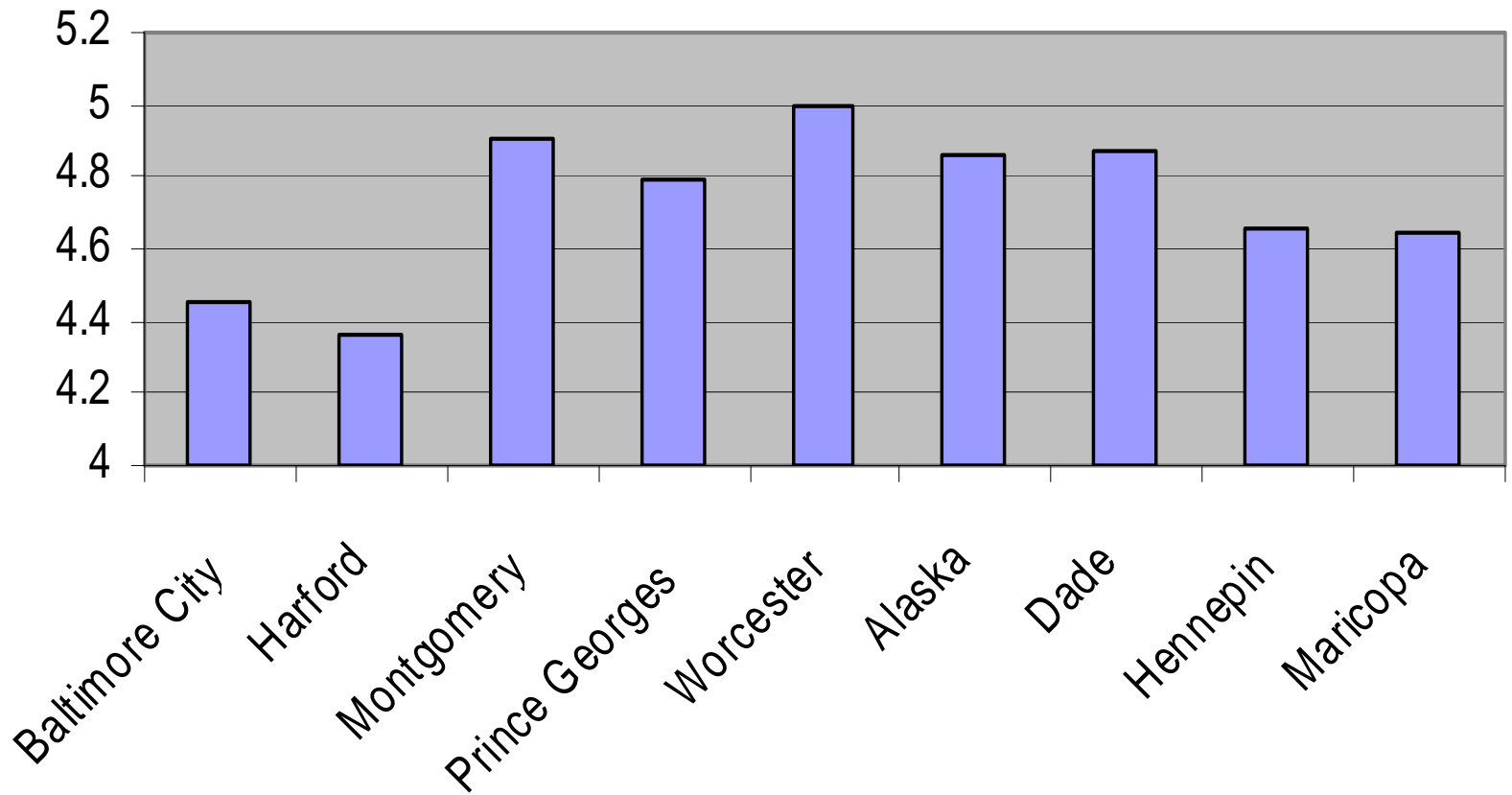
Ratings of Specific Services Provided

- So high that the data does not allow us to differentiate among them.

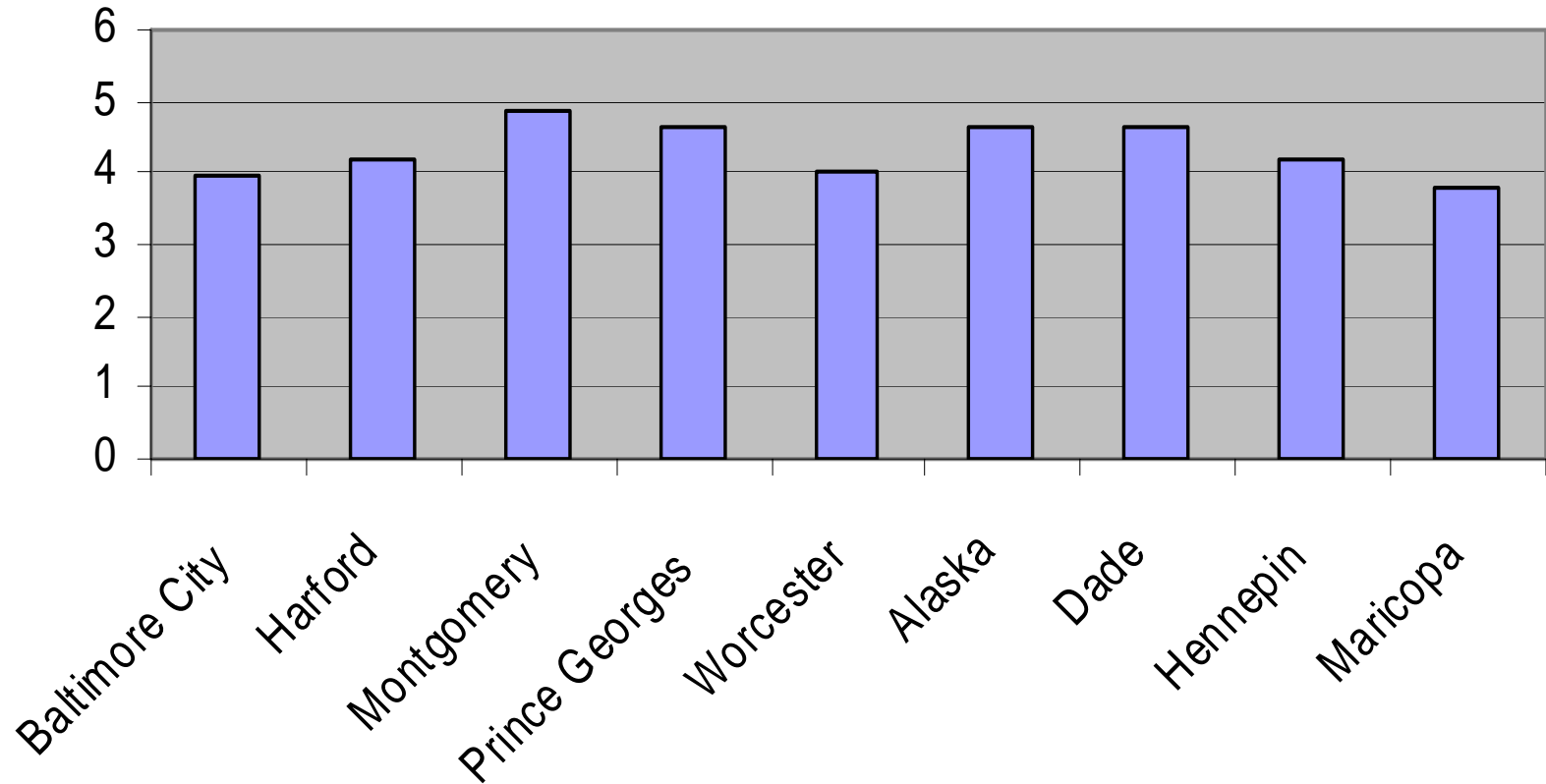
High at the Time of Court Appearance



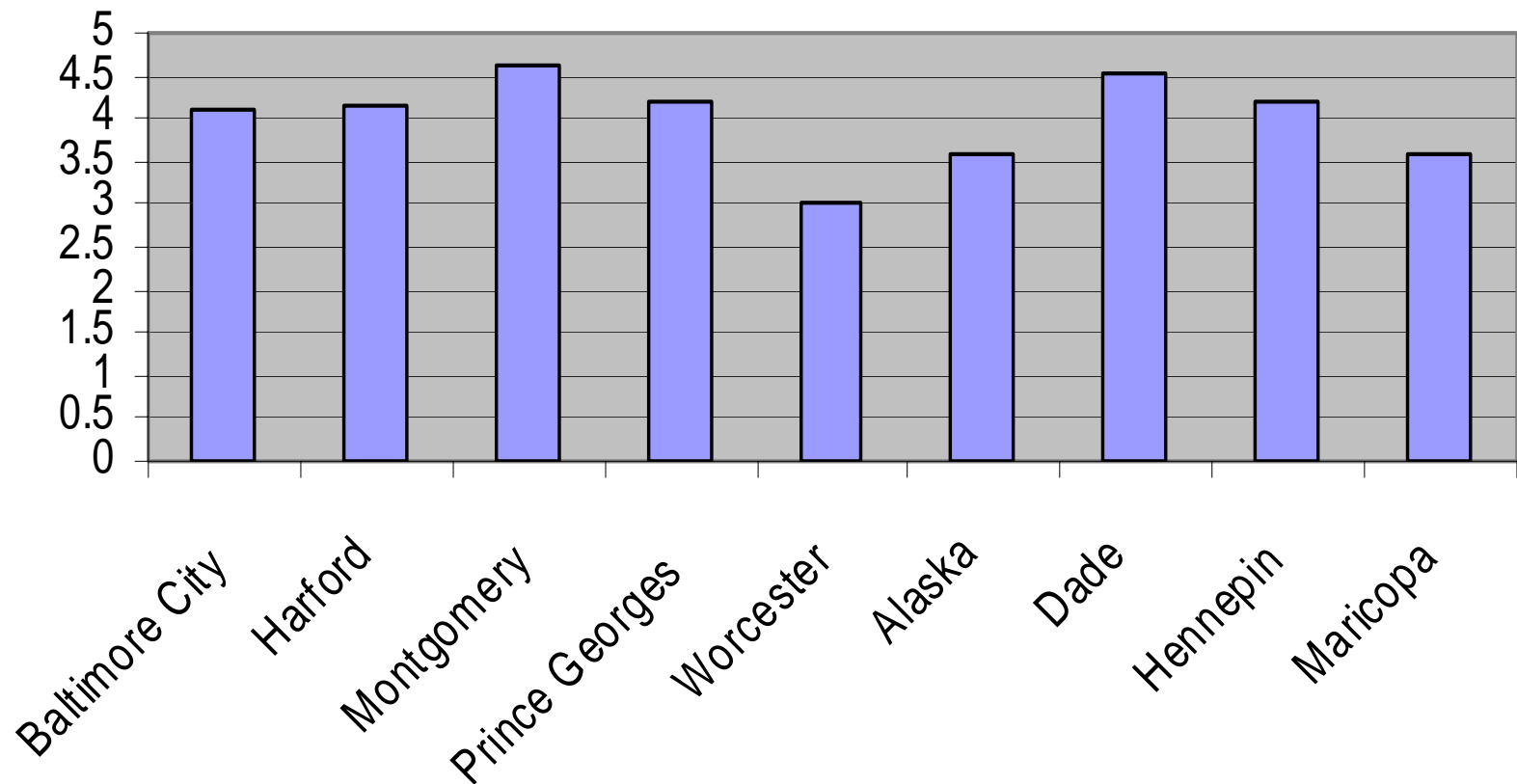
Litigant Rating of “Did the judge treat you with respect?”



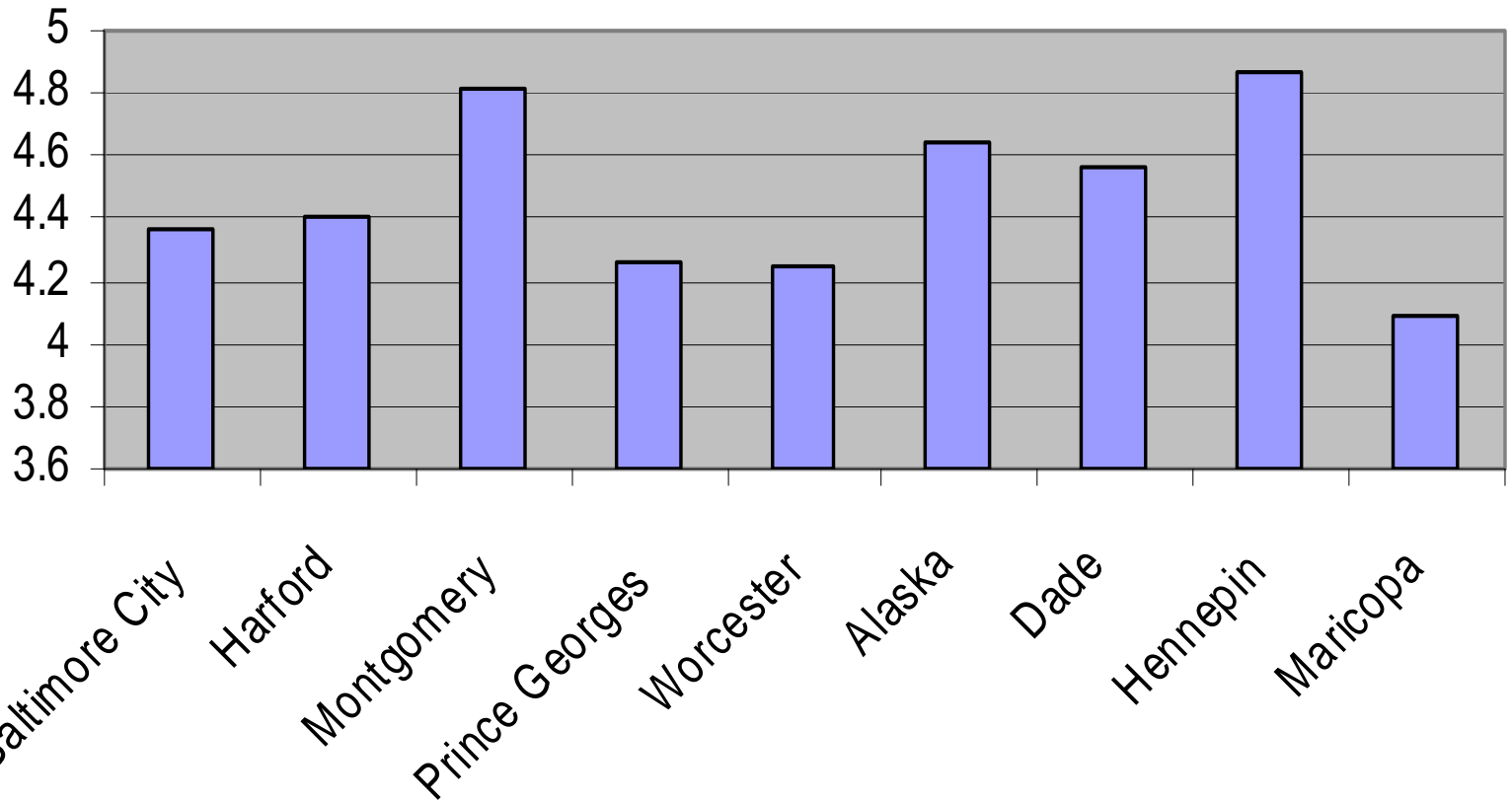
Litigant Rating of “Was the Judge’s ruling fair?”



Litigant Rating of “Did you feel prepared?”



Litigant Rating of “Can you explain the Judge’s ruling?”



Other Research Results

- Same level of satisfaction as represented litigants (64% v. 63%)
- Much lower dissatisfaction (16% v. 29%)
- Less likely to seek interim relief
- Less likely to seek modification of decree
- More likely to report that they understand the decree
- 70% would self-represent again

Litigant Performance in the Courtroom

Judges' Observations of the Performance of Self-Represented Litigants in Eight Jurisdictions (2005)

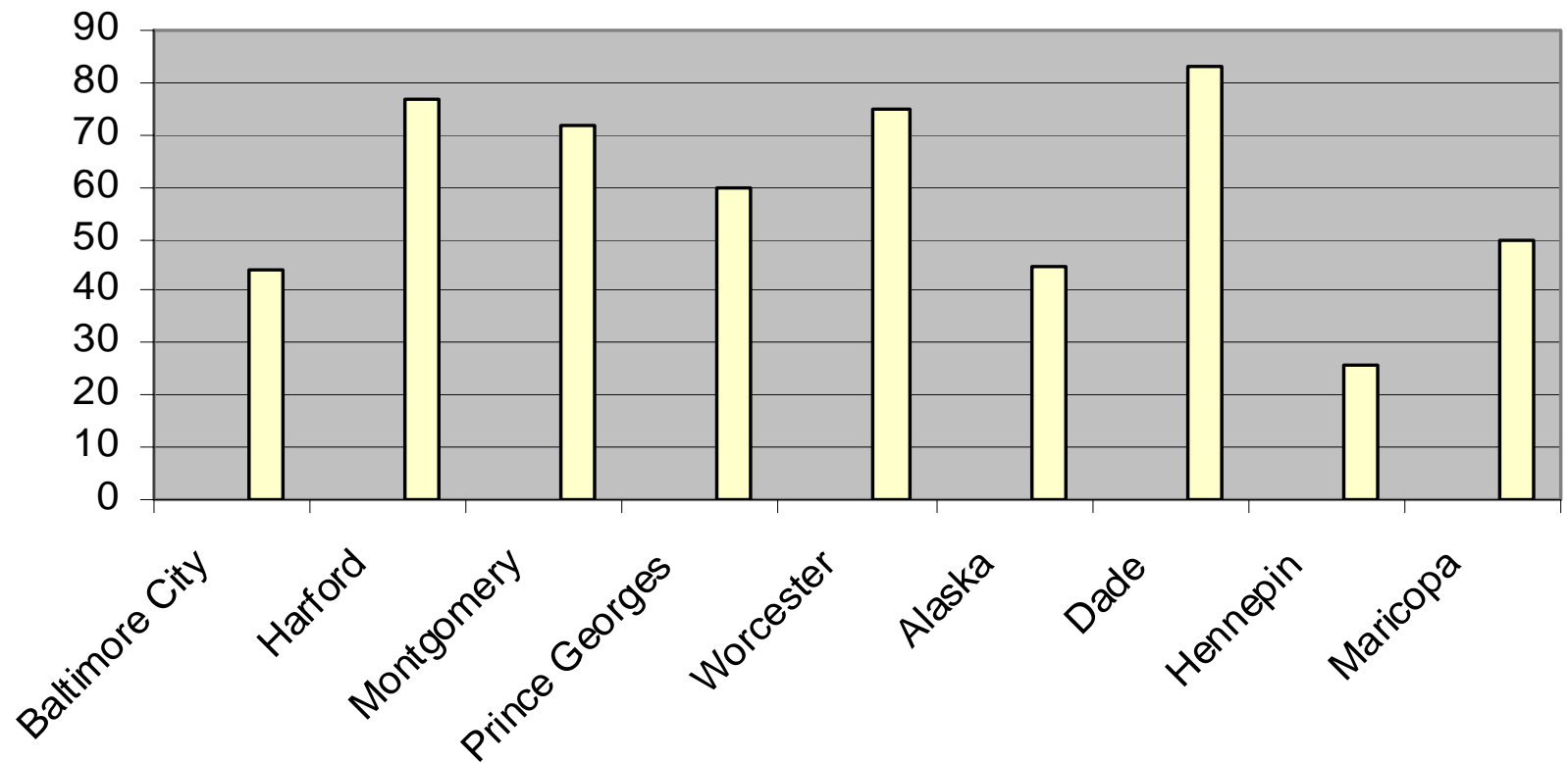
Data for	Yes		Somewhat		No	
	Visited Program	Did Not Visit Program	Visited Program	Did Not Visit Program	Visited Program	Did Not Visit Program
Documents prepared correctly	75%	68%	16%	15%	9%	17%
Had evidence or witnesses	74%	69%	6%	5%	20%	25%
Followed procedural rules	75%	70%	15%	19%	10%	11%
Participated effectively	74%	67%	20%	25%	6%	9%
Able to "tell story" effectively	75%	70%	20%	18%	4%	12%
Had reasonable outcome expectations	69%	61%	16%	24%	15%	16%
Understood court ruling	83%	83%	13%	8%	4%	10%

Disparity between judges' observations and opinions

- Answers to questionnaires reported low assessment of the ability of self-represented litigants to perform in the courtroom
- Individual judicial observations reported the opposite

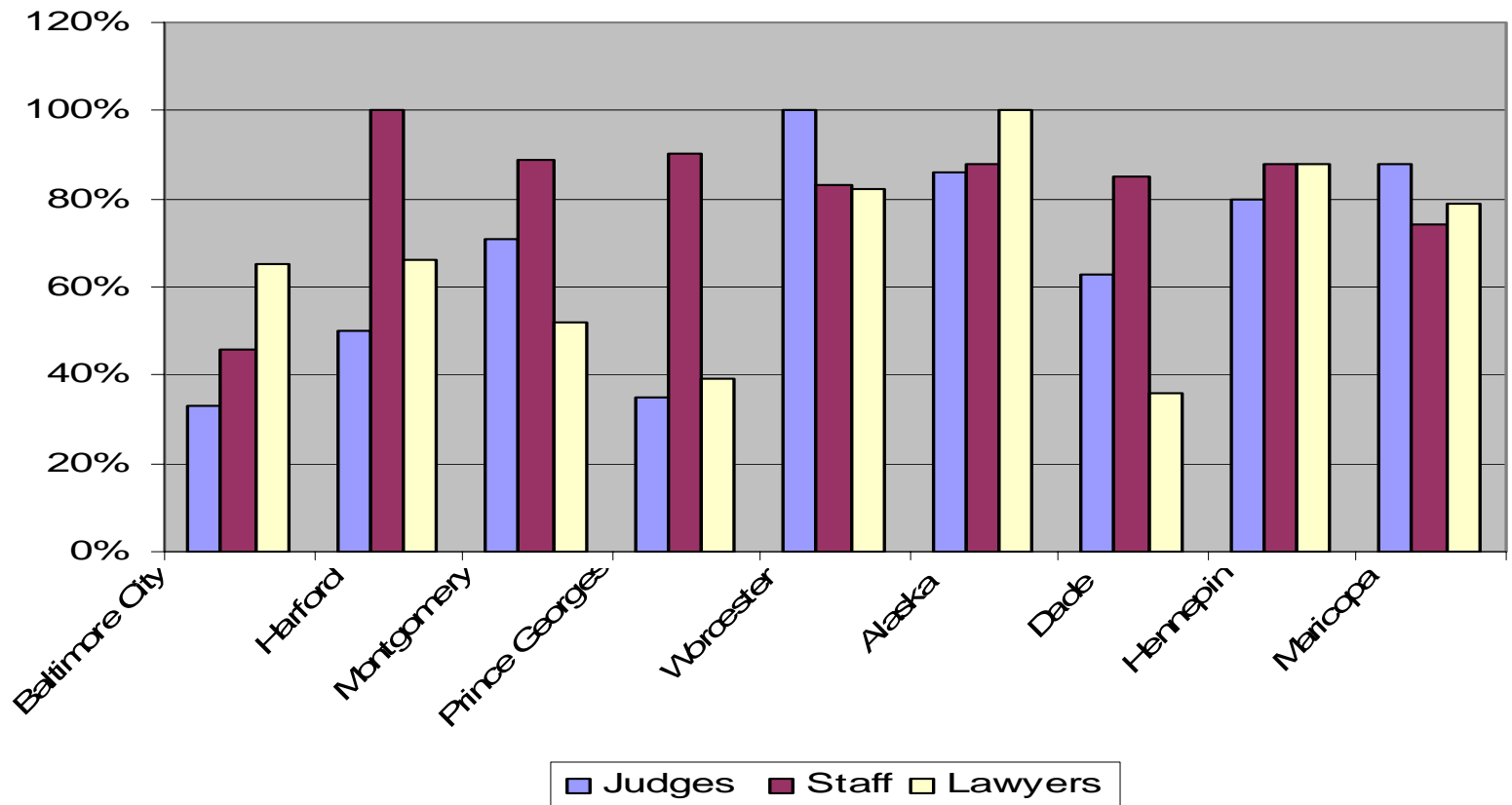
Use of Programs

Percentage of Self Represented Litigants Using the Services of Programs Provided by the Court



Stakeholder Satisfaction with Self Help Programs

Stakeholder Satisfaction



Process Observations

Process Observations

- Multiple successful program delivery strategies
 - One on one in person assistance
 - Telephone assistance
 - Web-based information and forms
 - Workshops
 - In person
 - Video-conference supported
 - Videotaped presentations

Process Observations

- Participation in self help programs can be mandated
 - Hennepin County – motions
 - Miami/Dade – all filings
 - Anchorage – participation in workshops by all self represented litigants in contested divorce and child custody cases

Process Observations

- Multiple successful staffing approaches
 - Court-employed lawyers
 - Court-employed paralegals
 - Court clerks
 - Contract services
- Self help program personnel need supervision from, or access to, a lawyer

Process Observations

- Court self help programs need to be supplemented with programs that provide legal assistance to some litigants
 - Legal services programs
 - Pro bono lawyer programs
 - Contracted legal advice programs
 - Unbundled legal services provided by the private bar

Process Observations

- Self represented litigant assistance must go beyond a self help program
 - Clerk's office staff
 - Chambers staff
 - Courtroom assistance
 - Assistance in understanding judicial decisions and orders
 - Assistance in enforcing court orders and judgments

California Evaluation Findings

Five Pilot Self-Help Centers

Characteristics of Self-Help Center Customers

- Income and education levels lower than those of general county populations
- Monthly household incomes \$2,000 or less (66%-96%)
- More than 60% in each program lacked a college degree
- Substantial proportion unemployed (43%-50%)

Characteristics of Self-Help Center Customers *(cont.)*

- Majority gender varied by case types served at each center
- Vast majority were moving party, except UD defendants at one center

Experience Seeking Legal Assistance

- At least 60% had not sought help before visiting the self-help center
 - Most who did seek help sought it from legal aid, private attorney, or friends/relatives
- At least 70% had not considered hiring a lawyer
- Most common reason for self-representing was inability to afford a lawyer
 - Other common reasons included not knowing whether a lawyer was needed or conscious choice to self-represent
- Customers most commonly heard of self-help center through clerk's office or friends/family

Impact of Programs on the Courts

- Self-help centers improve court efficiency
 - Cases delayed due to procedural problems were corrected and completed
 - Paperwork correct the first time, eliminating repeated trips to clerk's window
 - Litigants appeared at hearing with papers properly served, eliminating need for continuances
 - Clerks and judges spent less time answering questions

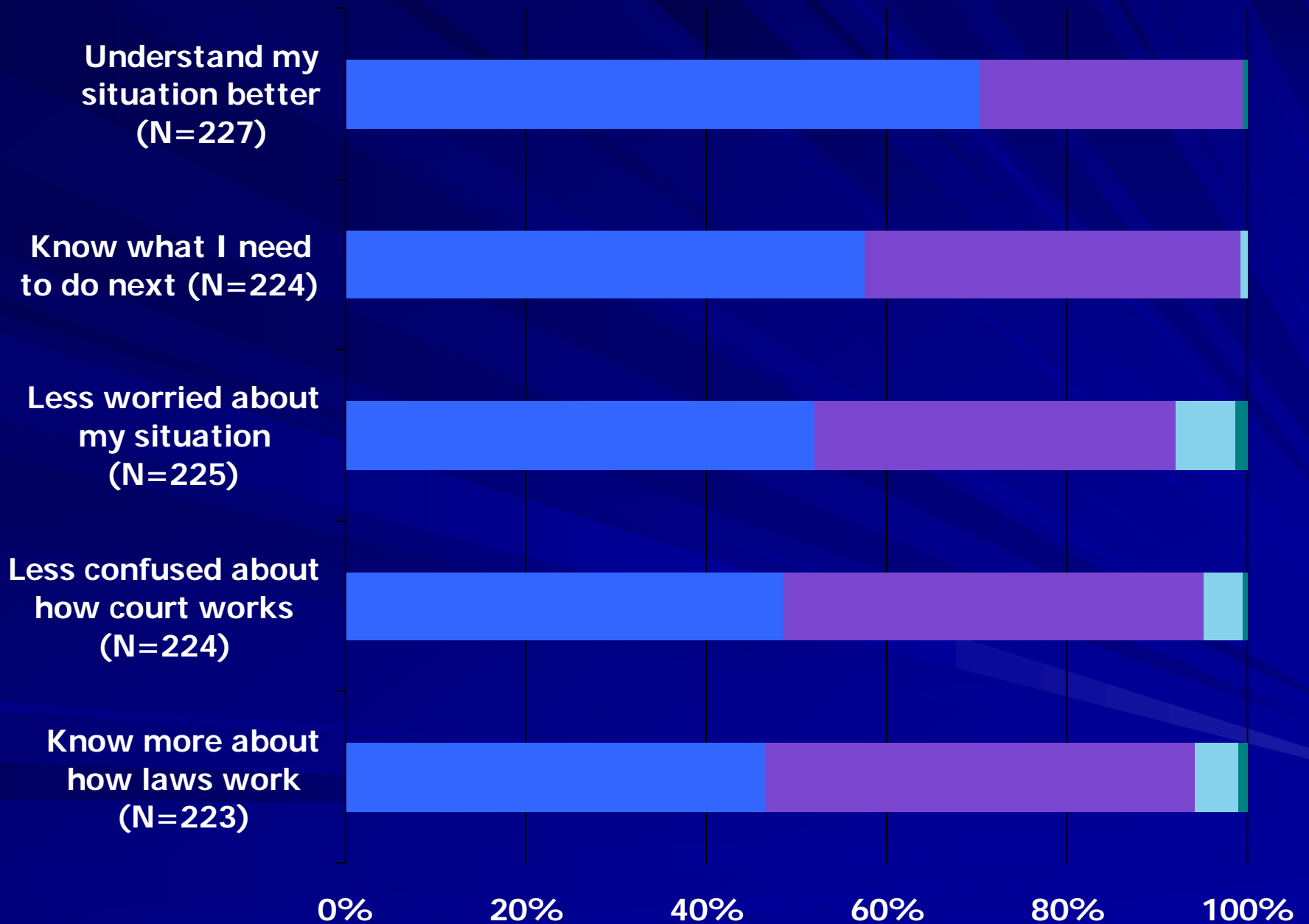
Impact of Programs on the Courts (*cont.*)

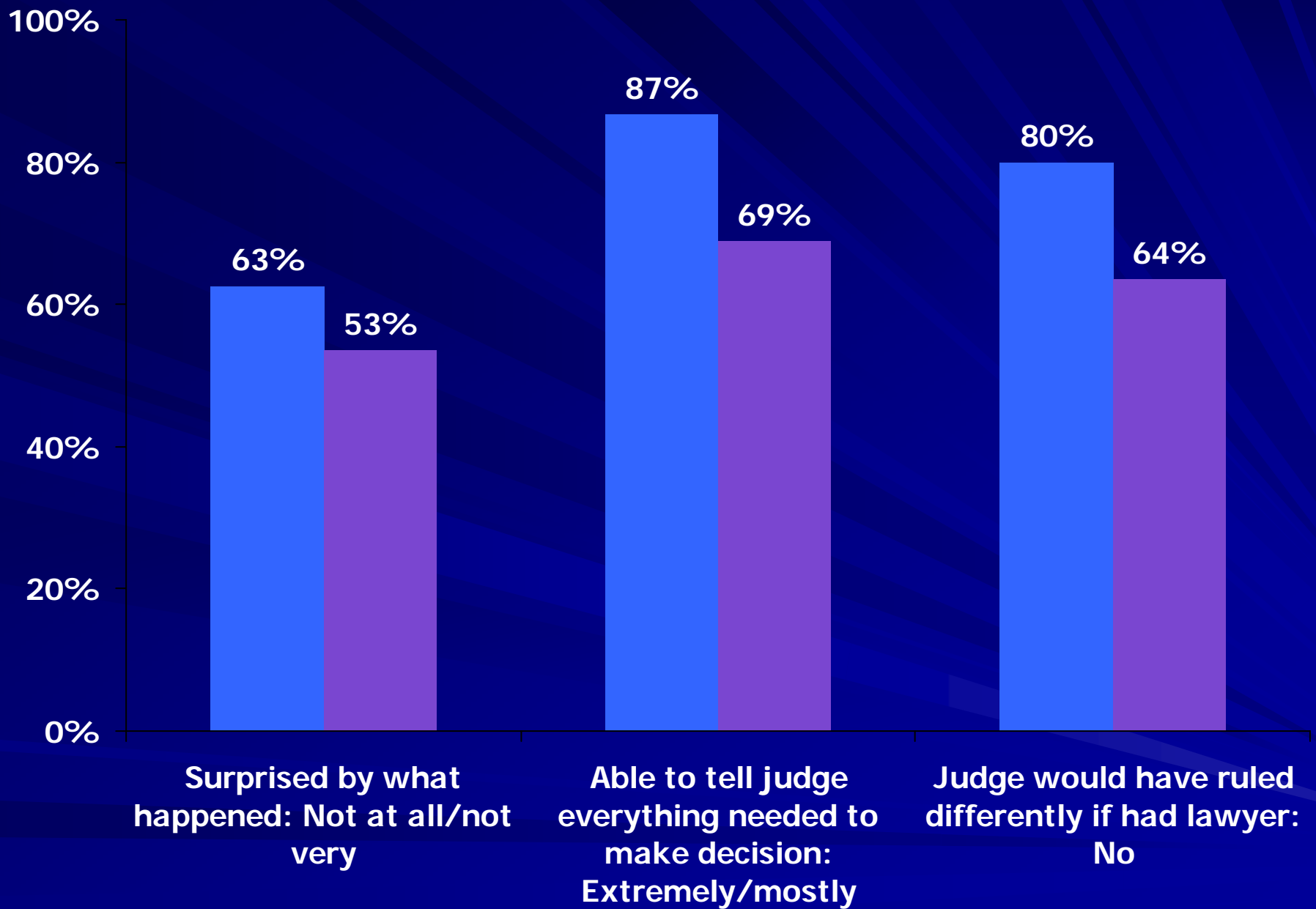
- By identifying issues faced by SRLs, programs helped courts develop creative ways to process cases more efficiently
 - Pro per day includes review of files prior to hearings and in-court assistance
 - Consolidation of UD settlement conferences to allow workshops to be held before calendar
 - Referral slip for judges to indicate problems/ additional needs when directing litigants to self-help center

Impact of Programs on Litigants

- Facilitate litigants' effective participation in legal process
 - Court file review shows center customers more likely to raise relevant issues and defenses, file proper accompanying paperwork, and reach settlements
- Promote public trust and confidence in court system
 - High levels of customer satisfaction
 - Post-hearing interviews show center customers more prepared for court, have more reasonable expectations of hearing

Strongly agree Agree Disagree Strongly Disagree





■ Users of self-help center (N=30-32) ■ Nonusers of self-help center (N=55-58)

Findings and Recommendations from Process Evaluation

- Videoconferencing and coordination between courts is an effective way to address limited funding
- Workshops are an effective way to serve larger numbers without adding staff
 - Wide range of services provided: legal and procedural information, forms and hearing preparation, assistance with motions, referrals to other services
 - Levels of satisfaction similar among workshop participants and drop-in customers
- Court-based self-help programs should be integrated with one another to increase efficiency and quality of service

Findings and Recommendations from Process Evaluation (*cont.*)

- The day-to-day availability of a managing attorney is critical
 - Understand procedural complexities
 - Able to do legal research if necessary
 - Familiar with legal terminology and professional ethics
 - Can identify when it is not feasible to self-represent
- Volunteers should not be relied on to perform core daily operations
 - Short-term commitments for internships; school out of session or final exam time
 - Quality training makes more enticing candidates for paid positions

Findings and Recommendations from Process Evaluation (*cont.*)

- Self-help centers should be designed to assist litigants at all stages of case processing
 - Case file review shows cases unresolved or not reaching timely judgment
 - Service tracking data show at least one-quarter of customers returning for help
 - Need for assistance with orders and compliance
- Self-help centers should be located at the courthouse
- Triage of cases is an important self-help center function

Findings and Recommendations from Process Evaluation (*cont.*)

- Interpreters are needed in family and other civil cases (currently mandated only in criminal and DV cases in CA)
- Bilingual and bicultural staff are needed to provide efficient services in communities with a high proportion of non-English speakers
- Coordination with community programs is helpful in serving non-English-speaking populations

Some Unanswered Questions

Unanswered Questions

- Why do many self help program users not pursue their cases in court?
- Why do self represented litigants not use self help programs that are available to them?
- Why do courtroom observers have different perceptions of case outcome from those of the judges?

Unanswered Questions

- Cost/benefit analyses of self help programs
- Comparative outcomes for represented and unrepresented litigants – are the courts truly providing self represented litigants with just outcomes?
- How effective are different methods of service delivery?

Unanswered Questions

- How do self-help centers interplay with the court and with other available services? Need more of a system-wide look at SRLs.
- Why aren't litigants finishing their cases?
- To what extent do self-help centers help to keep people/actions out of the court?
- Do self-help centers help to increase compliance with court orders?
- Do self-help centers create real time savings for the court?

Link to CA Evaluation Report

[http://www.courtinfo.ca.gov/programs/
equalaccess/modelsh.htm](http://www.courtinfo.ca.gov/programs/equalaccess/modelsh.htm)

Cost Effectiveness

■ Sonoma –

SHAC	\$81 per case
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Pro bono representation	\$140 - \$250 per case
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Federally funded staff lawyer	\$270 - \$460 per case
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Legal Advice vs. Legal Information

Principles upon Which to Build a Sound Policy

- The courts must provide information to court users about how the process works
- The limitations on what court staff can provide derive from ethical principles governing the courts
- Court staff need clear guidelines

Ethical Obligations of Court Staff

- To remain impartial
 - with respect to parties in a case
 - with respect to lawyers
- To maintain confidential information
- To avoid ex parte communications
- To perform competently

State and Federal Guidelines

- California
- Florida
- Idaho
- Iowa
- New Mexico
- New Jersey
- New York
- Iowa
- Michigan
- Utah
- Wisconsin
- Federal Judicial Center training materials

Definitions

- **Legal information**

Facts about the law and the legal process

- **Legal advice**

Advice about the course of action a client should take to further his or her own best interests

General Guidelines

■ Legal information

Staff should answer questions that call for factual information – questions that start with “who,” “what,” “when,” “where,” or “how.”

■ Legal advice

Staff should not answer questions that call for an opinion about what a litigant should do – questions that contain the words “should” or “whether.”

General Guidelines

■ Legal information

Staff should tell a litigant how to bring an issue to the attention of the court.

■ Legal advice

Staff should not suggest whether it is wise to bring that issue before the court, how best to present the issue, or how the judge is likely to decide the case.

General Guidelines

■ Legal information

Staff should inform a litigant of his or her options and the steps to carry out an option

■ Legal advice

Staff should not suggest which option the litigant should pursue.

Examples of state guidelines

- **Staff can explain court rules and procedures**
- **Staff cannot suggest which of several available procedures a litigant should follow**

Examples of state guidelines

- **Staff can provide information about past rulings in a case**
- **Staff cannot predict what the court will do**

Examples of state guidelines

- **Staff can cite (or copy) of statutes, court rules, and ordinances**
- **Staff cannot provide an analysis or interpretation of statutes or ordinances based on the specific facts of a litigant's case**

Examples of state guidelines

- **Staff can explain what records are kept by the court and can be made available to the public**
- **Staff can provide public case information**
- **Staff cannot provide confidential case information**

Examples of state guidelines

- **Staff can explain how and where to file a complaint concerning a judge, court employee or private attorney**
- **Staff cannot provide opinions about the conduct of a judge, court employee or private attorney**

Examples of state guidelines

- **Staff can provide general referrals to other offices or persons**
- **Staff cannot provide referrals to other offices or persons based upon personal preferences**

Examples of state guidelines

- **Staff can provide forms and instructions, and record on the forms information provided by the litigants**
- **Staff cannot provide or suggest the information that should be entered on the forms**

Guidelines are not enough

- Clerks need procedures manuals to which they can refer for correct answers to procedural questions
- Clerks need standard handouts on FAQs, such as service of process
- Clerks need training
- Clerks need customer service skills

Ethical Issues for Judges in Handling Cases with Self Represented Litigants

The Ethical Context

ABA Model Code of Judicial Conduct

- Canon 3B(7) requires a judge to “**accord to every person who has a legal interest in a proceeding . . . the right to be heard according to law.**”
- Canon 2A requires the judge to “**act at all times in a manner that promotes public confidence in the . . . impartiality of the judiciary.**”

Inherent Conflict?

ABA Standards Relating to Trial Courts, Standard 2.23

Conduct of Cases Where Litigants Appear Without Counsel.

When litigants undertake to represent themselves, the court should take whatever measures may be reasonable and necessary to insure a fair trial.

ABA Joint Commission on Evaluation of the Model Code of Judicial Conduct

■ Proposed Comment 3 to Rule 2.06

*To ensure impartiality and fairness to all parties, a judge must be objective and open-minded, and must not show favoritism to anyone. **It is not a violation of this Rule, however, for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.***

The Issues

- Neutrality is not synonymous with passivity
- Rather, the issue is, what are “reasonable” accommodations?
- Appellate decisions rely on an old formula and do not address the real issues
- What accommodations will be required?
- What accommodations are “unreasonable?”

The Reality

- There is no reported appellate case or ethical opinion finding a judge's specific accommodations to have gone too far
- There are numerous cases and opinions finding that judges did not provide sufficient accommodation or mistreated self-represented litigants

Basics of Indiana Law

Right to Be Heard

- Indiana Constitution, Article 1, Section 12
[A]ll courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase, completely, and without denial; speedily, and without delay.”

Right of Self Representation

A natural person may proceed pro se in court.

Court's Duty of Equal Treatment

“A litigant who chooses to proceed pro se will be held to the same established rules of procedure as trained counsel.”

Unique Characteristics of Indiana Law

- Indiana Code Section 34-10-1-2 empowering a judge to appoint counsel in a civil case
- Advisory Opinion # 1-97 introducing the reasonable accommodation notion in Indiana jurisprudence ten years before the ABA recognizes it

Advisory Opinion # 1-97

- Judges who turn litigants whose pleadings have minor deficiencies away on the grounds of neutrality and impartiality “violate other sections of the Code of Judicial Conduct.”
- “Fairness, courtesy and efficiency also are hallmarks of an honorable judicial system.”
- Judges have a duty to remedy the deficiency by a “simple inquiry.”

Advisory Opinion # 1-97

Limitations

- Non-adversarial cases
- Respectful and prepared pro se litigant
- Would not “put another at a disadvantage”
- Judge normally “should not ‘try a case’ for a litigant who is wholly failing to accomplish the task.”

Application of the Duty of Equal Treatment

- Substantive legal standards
- Burden of proof
- Competency of evidence
- Application of the statute of limitations
- Application of “hard” procedural bars, such as the time for filing a notice of appeal
- Rules of evidence and procedure

Complementary Principles

- The Indiana courts disfavor defaults and prefer to resolve a dispute on the merits of the case
- Courts will make every effort to decipher the claims of a litigant even though they are presented poorly and in improper form

Recurring Pattern of Appellate Cases

- Trial judge will make considerable efforts to accommodate the needs of a self-represented litigant
- Judge will stop at some point
- Litigant will appeal that issue
- Appellate court will affirm on the “equal treatment” rationale, while recognizing explicitly the other “unequal” treatment rendered, often with praise

Indiana Example

- Morton Nesses v. Specialty Connectors Co., Inc., Court of Appeals, First District (1990)

“[W]e wish to commend Judge Monroe for having the patience to give Nesses every benefit of the doubt. . . . Judge Monroe, of course, was not required to be as lenient as he was; pro se plaintiffs are held to the same rules of procedure as licensed attorneys.”

Assistance Allowable in Other Jurisdictions

- Liberal construction of documents filed
Hand written letters that could have been construed as an answer to the complaint
- Liberal opportunity to amend
- Assisting the parties to settle the case
- Granting a continuance *sua sponte* on behalf of the self represented litigant
- Explaining how to subpoena witnesses

Assistance Allowable in Other Jurisdictions

- Explaining how to question jurors and exercise peremptory challenges and challenges for cause
- Explaining the legal elements required to obtain relief
- Explaining how to introduce evidence
- Explaining how to object to the introduction of evidence

Assistance Allowable in Other Jurisdictions

- Explaining the right to cross examine witnesses presented by the opposing party
- Calling witnesses and asking questions of them
- *Sua sponte* admonishing the jury on behalf of a self represented litigant to disregard prejudicial testimony
- Preparing jury instructions for a self represented litigant or requiring opposing counsel to do so

The Other Side of the Coin

The trial judge will also be affirmed when s/he refuses to make specific accommodations, such as

- Dismissal of a complaint for failure to state a cause of action
- Dismissal of a case for failure to comply with discovery orders
- Failure to prevent opposing counsel from committing prejudicial misconduct
- Dismissing a case for failure to prosecute

The Other Side of the Coin

- Allowing inadmissible evidence at the request of the self represented defendant

The Grey Areas

Affirmative Duty to Advise Self Represented Litigant

- Federal and Alaska cases on Motion for Summary Judgment (not required in Indiana, Rickels v. Herr 1994)
- Recent US Supreme Court Case – Castro v. United States

Limits on “reasonable” accommodation

- Federal standard – prejudice to the other side
- Independent investigation, finding and subpoenaing witnesses
- Taking over the strategic legal decision making in the case – legal advice versus legal information

Structuring Trials and Hearings to Minimize Problems

Useful Techniques

General Principles

- Prepare thoroughly
- Provide the parties with guidelines
 - Primer on courtroom proceedings
 - Basic rules for evidence presentation
 - A list of elements that must be proved in order to obtain relief
- Conduct the proceeding in a structured fashion based on the required legal elements

Useful Techniques

General Principles

- Use plain English; avoid jargon
- Ask questions
- Provide written notice of further hearings, referrals and other obligations of the parties

Useful Techniques

Two Unrepresented Parties

- Swear both parties at the beginning of the proceeding
- Allow litigants to present their cases, while maintaining strict control over the proceedings
- Use active listening to reduce length of hearing
- Ask questions to elicit needed information
- Remain alert to imbalances of power in the courtroom

Useful Techniques

One Represented Party

- May be, but are not necessarily, difficult situations
- Some attorneys recognize the importance of a fair proceeding and go out of their way to accommodate the needs of the self-represented litigant
- But some don't

Useful Techniques

One Represented Party

- Swear both parties
- Allow counsel to advocate the client's position but not to silence the self-represented litigant
- Require counsel to state objections so as to indicate to the self-represented litigant the proper manner of proceeding
- Ask questions as necessary to obtain the information needed to make a fair ruling

Useful Techniques

One Represented Party

- Threatening to grant a *sua sponte* continuance will usually bring counsel into line

One Represented Party Really Difficult Issues

- Existence of a clear defense of which the self-represented litigant is not aware, such as the statute of limitations
- Failure of the unrepresented party to produce documentary support for proffered testimony
- Abuse by counsel of the self-represented litigant's ignorance – such as prejudicial statements to a jury or offering inadmissible testimony or evidence

Summary

Self-Represented Litigants Are With Us Permanently

- Disintermediation continues to grow dramatically throughout our society
- The Legal Services Corporation recognizes “assisted self-representation” as a legitimate and cost effective mechanism for delivering legal services
- Self-representation is the primary means for assuring access to justice for most poor and middle income Americans

Pat Answers Are Gone New Boundaries Have Not Been Established

- Affirmative obligations of the trial judge are not clear
- Outer limits of “reasonable” accommodation have not been drawn

It's Largely Within the Trial Judge's Discretion

- Equal treatment does not mean judicial passivity
- A judge will not be reversed on appeal for accommodating the needs of a self represented litigant to preserve his or her right to be heard
- A judge may or may not be reversed for refusing a specific accommodation

Challenge and Reward of Judging in This Environment

- The judge's attitude and values are critical and come to the fore
- Only the best judges should be trusted with these assignments
- Judges have an opportunity for genuine job satisfaction